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769-350—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 961

CALVIN KOVENS AND LEON COHEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–33) is reported at 338 F. 2d 611. The opinions of the district court (R. 45–48, 172–173) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1964 (Pet. App. 21). A petition for rehearing was denied on February 4, 1965 (Pet. App. 34). The petition for a writ of certiorari was filed on March 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether various trial rulings on the evidence were proper.

2. Whether the trial court's instructions to the jury on the question of intent were proper.

STATUTE INVOLVED

Section 1014 of Title 18, U.S.C., provides, in pertinent part:

> Whoever knowingly makes any false statement or report * * * for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any application, advance, * * * commitment, or loan, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

A ten-count indictment returned in the United States District Court for the Southern District of Florida charged petitioners with having knowingly and willfully made false statements to the Miami Beach Federal Savings and Loan Association for the purpose of influencing the Association to advance funds pursuant to a "Construction Loan Agreement" for the construction of a shopping center in Miami and with having conspired with each other to commit such an offense, in violation of 18 U.S.C. 1014 and 371 (R. 4–19). The petitioners were charged separately in the substantive counts which alleged that the false statements took the form of "construction draws", which were false in that they contained certifications that specific sums of money, itemized separately in schedule form, had been spent by the

contractor solely in constructing particular improvements when, as petitioners knew, such amounts had not been so expended in their entirety (R. 4–8, 9–13). After a trial by jury, each petitioner was convicted on three substantive counts and on the conspiracy count (R. 54).[1] Kovens was ordered to pay a fine of $3,000 on each of the four counts, for a total fine of $12,000, and was placed on probation for five years (R. 829–830). Cohen was ordered to pay a fine of $200 on each of the four counts, for a total fine of $800, and was placed on probation for two years (R. 831–832). The court of appeals unanimously affirmed (Pet. App. 21, 22–33).

The pertinent facts may be summarized as follows:

1. *The contract and preliminary arrangements.* During the relevant periods, petitioners Kovens and Cohen were the president and secretary, respectively, of the Cal Kovens Construction Corporation ("the Corporation"), a Florida corporation, the stock of which was owned by Kovens. Cohen was the office manager of the Corporation and supervised its bookkeeping operations and the office personnel (R. 499–501, 504, 599, 664). Ruedd, Inc., ("Ruedd"), also a Florida corporation, owned a 99-year leasehold on a tract of unimproved land in Miami. During the relevant periods, Kovens was the president of Ruedd. He owned about 20 percent of its stock to about the end of 1958, when he became a 97 percent stockholder (R. 128, 618, 634, 668). On December 31, 1958, Cohen became secretary of Ruedd (R. 128–130, 585, 598, 664).

On August 11, 1958, Kovens, on behalf of Ruedd,

[1] Two counts were dismissed before trial (counts 4 and 9), and Kovens was found not guilty on the remaining count (count 5).

applied to the Miami Beach Federal Savings and Loan Association ("the Association") for a construction loan of $742,000 in order to finance construction of a shopping center on Ruedd's leasehold interest (R. 364, 367, 377–381, 547–548, 571–572, 620–621, 625, 626, 863–865). The application recited, *inter alia,* that Ruedd had "Cash on hand" of $300,000 (R. 863). An accompanying "Appraisal Report" specified ten agreed-upon conditions to the granting of the loan, two of which were that the cash difference between the total cost of construction (approximately $1,000,000) and the proceeds of the loan (approximately $700,000), was to be supplied by Ruedd; and that "[f]ailure of $300,000 cash by Ruedd Corp. causes default in mortgage" (R. 552, 569–570, 623–624, 865). The tentative agreement, spelled out in the Appraisal Report, provided that Ruedd would put up the first $150,000 which would be spent before disbursement by the Association of any of the loan proceeds; the next $150,000 would be disbursed out of the loan proceeds; then, at the demand of the Association, Ruedd was to put up another $150,000 before the balance of the loan proceeds would be available for disbursement (R. 552, 554, 569–570, 865; see R. 392, 437–438, 446–447, 450–451, 876). At the time of the loan application, Ruedd had a cash position of about $160 (R. 473).

On August 15, 1958, the Corporation and Ruedd entered into a contract whereby, for $1,000,000 from Ruedd, the Corporation, as general contractor, agreed to construct a shopping center on Ruedd's leasehold

interest (R. 627–629, 920–924). Shortly thereafter, the Association approved the loan.

On December 5, 1958, the Corporation, Ruedd and the Association entered into a "Construction Loan Agreement" which embodied, *inter alia,* the agreements regarding the money to be put up by Ruedd and the manner of disbursement of the first $450,000 (R. 390, 392, 397–400, 443, 556–557, 876–879, 918–919). The agreement provided that Ruedd was to deliver $150,000 to the Association forthwith, and that the proceeds of the loan, together with the monies supplied by Ruedd, would be deposited in a "Construction Escrow Fund" for eventual disbursement (R. 876–877; see R. 918–919). The Association alone could disburse monies from the escrow fund, and it could do so only in connection with the shopping center construction (R. 451, 565, 572–573, 876, 877). The "basic understanding" of the parties was that the Association would disburse funds from the escrow fund only upon receipt of paid bills and releases of liens and certification from the Corporation or Ruedd that the bills of subcontractors and materialmen had been paid (R. 574, 576, 877).

Ruedd and the Corporation obtained the $150,000 down payment by a loan from the Coral Gables First National Bank of Coral Gables, Florida, for which they gave a 90-day note, with personal indorsement by Kovens (R. 457–461, 474, 635, 670–672, 675–676, 901, 902). At that time, Ruedd had a cash position of about $1,500. The note payable was not recorded in Ruedd's books of account (R. 474–475).

2. *The false representations.* On December 8, 1958, January 9, 1959, and February 24, 1959, Kovens or the Corporation submitted "Construction Draws" to the Association which requested the Association to draw a total of $650,000 from the construction escrow account in favor of the Corporation (R. 424, 674, 677, 880–883, 885–888, 889–892). Affidavits of Kovens, which were contained in each construction draw, recited, in part (R. 880, 885, 889), that the funds requested "have been expended for the sole purpose of constructing the improvement" according to the terms of the mortgage and escrow agreement.

There was submitted with each construction draw detailed itemizations of construction costs incurred and paid, together with supporting documents which included partial releases of lien from various subcontractors and materialmen (R. 403–405, 410–411, 418–419, 424–425, 882–883, 887–888, 891–892). The amounts of money requested in the draws equaled the total amounts of the expenditures certified therein as having been expended in construction of the project. The Association checked the itemized expenditures against the supporting documents in order "to see that it corresponded with the amount that was being requested to be paid out" (R. 361, 403–404, 445). After the draws had been checked and approved, the Association disbursed funds to the Corporation in accordance with the draws (R. 445–446, 884, 899, 900).[2]

[2] The difference between the amount the Corporation received under the second draw (or $123,637.84) and the amount requested in such draw (or $149,537.84), was due to the fact that the Association had been requested by the Corporation to pay certain expenditures directly in the amount of $25,900, thus

Four itemized expenditures in the first draw, two in the second draw and three in the third draw were alleged by the bill of particulars (R. 50–52) and shown by the proof to have been false. For present purposes, we set forth the particulars regarding item number 11 of the first draw (December 8, 1958) as illustrative of the other false items. Item number 11, in the amount of $25,721 for "Fill" (R. 882), was supported in part by a partial release of lien for $24,940 from the Marx Brothers Company, dated November 15, 1958 (R. 349–351, 861–862). Actually, however, no payment had been made to the Marx Brothers (R. 469, 602), and Mr. Herman Marx testified that his firm's total services with regard to the shopping center project amounted to about $600. He said that he "seriously doubt[ed]" that the $24,940 figure was on the partial release of lien form when he signed it (R. 348-351, 355–356).

The various subcontractors and materialmen who performed services or supplied materials for the Corporation at the construction site generally dealt with Cohen in matters of obtaining payment and signing releases of lien (R. 246–248, 258, 284–287, 300, 340–341, 346–347, 500–501, 594–595, 597, 599–600, 664). Cohen witnessed or received all of the pertinent releases of lien and made out most of the checks to the sub-contractors and materialmen (R. 246, 248, 258, 280–281, 300–301, 340, 350, 500–503, 599–600, 601, 602,

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leaving a net amount to the Corporation of $123,637.84 (R. 575, 577–578, 885, 887–888, 899). A similar arrangement existed in the third draw, with the Association being requested to pay out expenditures totaling $25,780 (R. 889, 891–892, 900).

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608, 842, 845, 848, 849, 851, 856, 859, 862, 894, 895, 896). These checks were signed by Kovens (R. 500–501, 843, 846, 852, 853, 857, 860, 904).

Expenditures were overstated in the first draw by about $66,000; in the second draw by about $30,000; and in the third draw by about $75,000. In the meantime, the Corporation paid off the $150,000 note liability to the Coral Cables Bank (R. 475, 671–672, 880, 885, 889, 902).

On February 24, 1959—the date that the third construction draw was submitted—the Corporation gave the Association a check for the second $150,000 deposit which the Association had demanded (R. 649–650, 672, 889, 916). This money had been borrowed by Kovens from a Miami Beach bank and deposited on the previous day in the Corporation's checking account (R. 475–476, 649–650, 672, 906). This was the same bank account where the Corporation deposited the checks received from the construction draws (R. 475–476, 672). On February 25, 1959, a number of checks, including one for $150,000 (the second $150,000 check given to the Association) cleared the Corporation checking account. Had it not been for the deposit of the proceeds of the third draw (about $350,000) on the following day, the account would have been overdrawn by about $150,000 (see R. 906, 916). Petitioners thus obtained 100 percent financing of the construction costs of the shopping center from borrowed funds (see R. 735–736, 771).

ARGUMENT

1. Before trial, the district court directed the government to furnish particulars showing "what funds,

drawn under the provisions of the construction loan agreement, are claimed to have been diverted or not expended for the sole purpose of constructing the improvements on the property described in the loan agreement" (R. 46). The government furnished a bill of particulars which enumerated the items in the three construction draws which "had not in fact been expended as alleged" (R. 50–52). At a pre-trial conference, counsel for Kovens took the position that the "sole issue" in the case was whether the defendants had "wrongfully diverted" funds obtained from the Association in the sense that those funds were not expended on the shopping center (R. 155–156). The government responded that it did not have to show that the money was not ultimately spent on the construction, but that it was enough to show that the statements in the construction draws were false in the sense that the representations that money had been expended were untrue (R. 152, 157–158).

Before the case went to trial, Judge McRae, in defining the issues of the case, ruled that the indictment charged the offense of knowingly making a false statement for the purpose of influencing action of the Association and said (R. 172–173):

> Whether or not the Savings and Loan association was later pleased with the work or whether or not at some other or different times, monies were expended, and whether or not an accounting was taken subsequently to the completion of the job which showed something or other. It seems to me that that does not go to the heart of the case in any respect, and evidence on those points will not be received.

In other words, it was the government's theory that petitioners had falsely "padded" several items in each of the construction draws, and that the money which they represented as paid to the enumerated firms was, in fact, not paid to those firms at that time or, in the case of certain other firms, at any time during the construction of the property. Although there was no evidence that the funds had been taken for petitioners' personal use, it was a fair inference that the "padding"—*i.e.*, the excess over actual monies certified to have been expended on particular dates—was used to pay for the initial loan obtained by Ruedd from the Coral Gables Bank. In this manner petitioners misled the Association into believing that the amounts paid on each draw were secured by particular construction which had been paid those full amounts; in fact, petitioners were overstating the cost of certain construction and using the excess to repay the initial loan to Ruedd.

Petitioners' various challenges to the district court's rulings on evidentiary questions (Pet. 8–9, 10–11) are based on a misinterpretation of the charge against them:

a. The court properly refused to admit evidence showing the total amount of money spent by the Corporation on the project as of December 8 or 9, 1958 (R. 485–487; see Pet. 9). Counsel for Kovens explained to the court that the breakdown "probably didn't go to the people named but it was paid on this job, and we say that their books will so reflect" (R. 486). But the issue on falsity was simply whether the particular amounts of money enumerated and itemized in the draws as certified expenditures on

the project as of the dates the draws were submitted had in fact been so expended. The Association authorized payment on each of the draws in reliance upon the specific enumeration made therein. The falsity of those representations was not cured by the fact that *other* subcontractors and materialmen had been or were to be paid.

b. Petitioners offered evidence (see R. 566, 579–581) of the alleged common practice that (see R. 581):

> when these construction draws are requested, there are partial releases of liens attached thereto, and it is known by both sides that that does not mean that the bills, or the amounts indicated by the request on the construction draw and partial release of lien have in fact been paid prior to that time.

The court properly rejected such evidence since the general practice, even if proved, had no bearing on the issue whether petitioners' draws could be "padded" by such misleading releases of lien. Nor did the custom and practices of other lending institutions in the Miami area bear upon the permissibility of this practice. It was not suggested in the offer of proof that other banks or loan institutions willingly authorized payment for nonexistent construction or padded construction costs.

c. Kovens was asked by his counsel whether he had any discussion with "Mr. Brown or any members of the bank" about the "formality" of the draws, and he replied (R. 636):

> No, sir. The bank had mentioned to me that they were not concerned with any draws, because of the many jobs.

The court's ruling sustaining an objection to this testimony was correct. The "formality" of the draws was not at issue since, even if informal procedures had been agreed upon, petitioners would not have been entitled to engage in misrepresentation. Moreover, both the question—which referred to "members of the bank"—and the answer—which responded in terms of "[t]he bank"—failed to identify any particular speaker. Hence, they were inadmissible as phrased.

d. The court properly struck from the record Kovens' testimony that the Association "approved for the air conditioning to be given on a note basis" and refused to rule that the giving of a promissory note amounted to "payment" (R. 651, 660–661; see Pet. 9). The record shows that the Corporation gave a $20,000 note to Bransfield & White and a $50,000 note to Sam Hamilton in connection with work actually done on items 13 and 36 of the third construction draw, respectively (R. 51–52, 260–261, 597, 604). But there is nothing in the record to show that the parties understood the notes to constitute "payment" of the underlying indebtedness,[3] or that the Association would have agreed that such notes were payment. Indeed, "payment" by note could not have been payment "in full" required by the construction loan agreement (see R. 876–877), since the obligation on the contractor's part to make payment still existed. Moreover, even if the offer of proof should have been accepted, that would not have affected the other false

[3] Sam Hamilton did not testify. Bransfield testified that his company "would not record a note as payment" (R. 260). (Emphasis added.)

item in the third construction draw—petitioners' $5,000 "padding" of a bill for "electric" expenses (R. 302–304, 850–852).

2. The court's charge properly placed the issue of intent before the jury. The court said in part (R. 778–779):

> Now, before you can convict these defendants Calvin Kovens and Leon Cohen, you must find that the Government has presented credible evidence and testimony which convinces you to the exclusion of and beyond any reasonable doubt that Calvin Kovens and Leon Cohen did:
>
> (1) Act voluntarily and purposely and not because of mistake or inadvertence or other innocent reasons; and
>
> (2) That they acted with a specific intent to violate the law; and
>
> (3) That they actually made or caused to be made the false statements alleged; and
>
> (4) That they did so for the purpose and intention of influencing the Miami Beach Federal Savings and Loan Association in advancing funds pursuant to a construction loan agreement dated December 5, 1958; and
>
> (5) That it was a material representation which means that it was important and more or less necessary, intending to influence; and
>
> (6) That each and every one of these elements have all been proved; for if the Government fails to prove any one of these elements beyond and to the exclusion of a reasonable doubt, it is your duty to acquit the defendants.

The court then defined the terms "knowingly", "wilfully" and "false", and reiterated the necessity for

the government to prove the materiality of the alleged false statements (R. 779–780).

The decision below, therefore, is clearly not in conflict with *Morissette* v. *United States,* 342 U.S. 246, as petitioners argue (Pet. 12–15). In *Morissette,* the trial court refused to permit one accused of larceny to defend on the basis that he believed the property taken to have been abandoned, ruling that, as a matter of law, the requisite intent was to be presumed from the act of taking the property. In the instant case, however, the court charged that while a person is presumed to have intended the natural and probable consequences of acts knowingly done or knowingly omitted, the jury nevertheless was entitled "to consider any statements made and acts done by Calvin Kovens and Leon Cohen, and all facts and circumstances in evidence which may aid determination of state of mind, remembering that his intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt" (R. 786).[4]

Petitioners also complain that the Fifth Circuit did not follow its own decision in *Mann* v. *United*

[4] In *Smith* v. *United States,* 230 F. 2d 935 (C.A. 6), cited by petitioners, the court held that the trial court ignored the element of criminal motive and guilty mind when it instructed the jury that they should convict if they believed beyond a reasonable doubt that the defendant knew that the proceeds of the F.H.A. loan would not be applied as stated in the loan application, stating that the instruction did not take into consideration the fact that there was undisputed evidence that a bank official had advised the defendant that the loan proceeds could be used "to pay for improvements already completed, that is, for existing debts." 230 F. 2d at 938. The situation here is quite different. The other cases cited have no bearing on this case.

States, 319 F. 2d 404, certiorari denied, 375 U.S. 986, reversing a tax fraud conviction because the judge had instructed that "unless the contrary appears from the evidence" the jury could infer that the defendant intended the natural and probable consequences of his acts. The court found the instruction defective because the words, "unless the contrary appears from the evidence" operated to shift the burden of proof "from the prosecution to the defendant to prove lack of intent." 319 F. 2d at 409. In the instant case, an almost identical instruction appears (R. 786). In this case, however, unlike *Mann,* the instruction in question was preceded and followed by unequivocal directions to the jury that the government retained the burden of proving all elements of the offenses, including that of intent. Thus, the court charged that to convict the petitioners the government had to prove beyond a reasonable doubt that the petitioners, *inter alia,* acted "voluntarily and purposely" and with a "specific intent to violate the law" (R. 778–779; see R. 785). After the instruction in question was given (R. 786), the court charged that petitioners' "intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt"; and that the "burden of proof is upon the Government, from beginning to the end of the trial; and this burden never shifts from the Government to the defendants; the defendants are not bound to explain anything, and their failure to explain anything connected with this case cannot be considered by you as a circumstance tending to prove their guilt" (R. 786,

790). Thus, the instruction in question could not have had the effect of shifting the burden of proof on intent from the prosecution to petitioners.[5]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1965.

[5] In *Sherwin* v. *United States*, 320 F. 2d 137, certiorari denied, 375 U.S. 964, the Ninth Circuit upheld the same instruction which the Fifth Circuit condemned in *Mann*. Despite the conflict, this Court denied certiorari in *Mann* (375 U.S. 986) and in *Sherwin* (375 U.S. 964). See also *Estes* v. *United States*, 335 F. 2d 609, 615–616 (C.A. 5), certiorari denied on January 18, 1965, No. 601, this Term.

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